

3-29-2017

# Lewis v. State Respondent's Brief Dckt. 44294

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

DEREK WAYNE LEWIS,	)	
	)	No. 44294
Petitioner-Appellant,	)	
	)	Ada County Case No.
v.	)	CV-PC-2015-18219
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

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**HONORABLE MELISSA MOODY  
District Judge**

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## STATEMENT OF THE CASE

### Nature of the Case

Derek Wayne Lewis appeals from the district court's order summarily dismissing his second successive petition for post-conviction relief.

### Statement of Facts and Course of Proceedings

In 2009, Lewis pled guilty to second-degree murder. (See R., p.57; ICourt Portal, State v. Lewis, Ada County District Court Case No. CR-2008-03469.) Lewis did not file a direct appeal. (See R., p.57.) Lewis filed post-conviction petitions in January 2010 and January 2015. (See R., pp.44-52, 57;<sup>1</sup> ICourt Portal, Lewis v. State, Ada County District Court Case No. CV-2010-01131; ICourt Portal, Lewis v. State, Ada County District Court Case No. CV-2015-00080.) Lewis did not appeal from the district court's summary dismissal of either of these petitions. (See ICourt Portal, Lewis, Ada County Case No. CV-2010-01131; ICourt Portal, Lewis, Ada County Case No. CV-2015-00080.)

In October 2015, Lewis filed a *pro se* second successive post-conviction petition. (R., pp.4-16.) The district court granted Lewis' motion for appointment of counsel to represent him in the proceeding. (R., pp.18-19.) Through appointed counsel, Lewis filed an amended petition which contained the following four claims: (1) trial counsel was ineffective for failing to adequately argue a motion to suppress certain unspecified incriminating statements Lewis made during police interviews; (2) trial counsel was ineffective for failing to request that

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<sup>1</sup> The district court granted Lewis' motion to take judicial notice of Lewis' initial post-conviction petition. (R., pp.53-54.) The petition therefore appears in the appellate record in the present case. (R., pp.44-52.)

the district court order a psychological evaluation prior to sentencing; (3) initial post-conviction counsel was ineffective for failing to appeal the district court's dismissal of the initial post-conviction petition; (4) initial post-conviction counsel was ineffective for failing to draft an amended petition or to respond to the state's motion for summary dismissal. (R., pp.35-41.)

The district court filed a notice of intent to dismiss Lewis' amended second successive post-conviction petition.<sup>2</sup> (R., pp.56-61.) The court set forth four grounds for dismissal: (1) the second successive petition was barred pursuant to I.C. § 19-4908 because Lewis failed to establish sufficient reason why his claims were not raised previously; (2) the petition was barred pursuant to I.C. § 19-4908 and Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007), because it was untimely; (3) the petition was not properly verified as required by I.C. § 19-4902(a) and I.C. § 19-4903; and (4) Lewis failed to present a *prima facie* case demonstrating he was entitled to relief on any of his claims. (R., pp.56-61.)

Lewis filed a response and a new, properly verified, amended petition.<sup>3</sup> (R., pp.62-73.) The district court accepted the verified amended petition, but summarily dismissed it on the other three grounds set forth in its notice to dismiss. (R., pp.74-78.) Lewis timely appealed. (R., pp.79-81.) The district

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<sup>2</sup> While the state filed a motion for summary dismissal of Lewis' *pro se* second successive post-conviction petition (R., pp.22-25), it did not file a renewed motion to dismiss in the time between the filing of Lewis' amended petition and the district court's summary dismissal of that petition. Therefore, the court's dismissal was *sua sponte*.

<sup>3</sup> Other than the fact that it was verified, the new amended petition was substantially identical to the previously-filed amended petition. (R., pp.35-41, 67-73.)

court appointed counsel to represent Lewis in his appeal from the dismissal order. (R., pp.82-85.) However, the Idaho Supreme Court granted appointed counsel's motion to withdraw from the case after counsel failed to identify any meritorious appellate issues. (10/20/16 Motion and Memorandum in Support; 11/3/16 Order.) Lewis proceeds *pro se*. (See Appellant's brief.)



## ISSUE

Lewis states the issue on appeal as:

Did the court error [sic] in dismissing the successive P.C.?

(Appellant's brief, p.4.)

The state rephrases the issue on appeal as:

Has Lewis failed to demonstrate that the district court erred in summarily dismissing his second successive post-conviction petition?

## ARGUMENT

### Lewis Has Failed To Demonstrate That The District Court Erred In Summarily Dismissing His Second Successive Post-Conviction Petition

#### A. Introduction

Lewis contends that the district court erred in summarily dismissing his second successive post-conviction petition. (See generally Appellant's brief.) However, a review of the record and applicable law reveals that the district court correctly dismissed the petition because: (1) Lewis failed to demonstrate "sufficient reason" why his claims could not have been adequately raised earlier, as required by I.C. § 19-4908; (2) the petition was untimely; and (3) Lewis failed to present a *prima facie* case demonstrating he was entitled to relief on any of his claims.

#### B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

#### C. The District Court Properly Dismissed Lewis' Second Successive Post-Conviction Petition

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the

burden of establishing that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, in response to a party's motion or on the court's own initiative, if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

Also, because the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary disposition is permissible, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences. State v. Yakovac, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008). That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. Id.

A successive petition for post-conviction relief is generally not permissible. I.C. § 19-4908 (claims not raised in initial post-conviction proceedings generally waived). Only in cases where the petitioner can show “sufficient reason” why claims were “inadequately presented in the original case” may he have the opportunity to re-litigate them. Griffin v. State, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006) (citation omitted); see also I.C. § 19-4908.

In Murphy v. State, 156 Idaho 389, 392-395, 327 P.3d 365, 368-371 (2014), the Idaho Supreme Court overruled prior precedent and held that ineffective assistance of post-conviction counsel cannot constitute “sufficient reason” for filing a successive petition under I.C. § 19-4908. Murphy, 156 Idaho at 392-395, 327 P.3d at 368-371. The Court reasoned that because, as the United States Supreme Court has recognized, there is no constitutional right to an attorney in state post-conviction proceedings, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings, even as a means of attempting to overcome state procedural hurdles. Id.

An analysis of whether “sufficient reason” exists to file a successive petition also includes an analysis of whether the petition was filed within a “reasonable time” after the petitioner’s discovery of the factual basis for the claim. Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). “In determining what a reasonable time is for filing a successive petition, [the court] will simply consider it on a case-by-case basis, as has been done in capital cases.” Charboneau, 144 Idaho at 905, 174 P.3d at 875.

In this case, the district court summarily dismissed Lewis’ second

successive post-conviction petition on the following grounds: (1) the petition was barred pursuant to I.C. § 19-4908 because Lewis failed to establish sufficient reason why his claims were not raised previously; (2) the petition was untimely pursuant to I.C. § 19-4908 and Charboneau; and (3) Lewis failed to present a *prima facie* case demonstrating he was entitled to relief on any of his claims. (R., pp.56-61, 74-78.) Lewis has failed to show that the district court erred in utilizing any of these alternative grounds for dismissal.

1. Lewis' Second Successive Petition Was Barred By I.C. § 19-4908

Below and on appeal,<sup>4</sup> Lewis argued that ineffective assistance of his initial post-conviction counsel constitutes “sufficient reason” for the filing of his second successive post-conviction petition. (R., pp.62-63, 65.) Specifically, Lewis contended that his initial post-conviction counsel failed to amend his *pro se* petition and that he has never had the opportunity to present the merits of his ineffective assistance of trial counsel claims. (Id.) Therefore, Lewis argues, he should be entitled to the “relief contemplated by Martinez v. Ryan,” in which the United States Supreme Court held that in a federal habeas proceeding, a court may excuse the procedural default of an ineffective assistance of trial counsel claim where post-conviction counsel was ineffective in pursuing the claim in state post-conviction proceedings. (R., p.65 (citing Martinez v. Ryan, 566 U.S. 1, 4-18 (2012).)

Lewis' argument is precluded by Murphy. As discussed above, in Murphy,

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<sup>4</sup> On appeal, Lewis relies primarily upon his “Reply to Court’s Notice of Intent to Dismiss Successive Petition,” which he filed in district court (R., pp.62-66), and then attached, in its entirety, to his Appellant’s brief (see generally Appellant’s brief).

the Idaho Supreme Court held that ineffective assistance of post-conviction counsel cannot constitute “sufficient reason” for filing a successive petition under I.C. § 19-4908. Murphy, 156 Idaho at 392-395, 327 P.3d at 368-371. Further, Martinez v. Ryan and related cases have no applicability to Idaho post-conviction proceedings. Schultz v. State, 159 Idaho 486, 489-490, 362 P.3d 561, 564-565 (Ct. App. 2015); Grant v. State, 156 Idaho 598, 602-603, 329 P.3d 380, 384-385 (Ct. App. 2014). Therefore, Lewis has failed to demonstrate that the district court erred in declining to find “sufficient reason” to consider the merits of his successive post-conviction claims.

Next, as the district court correctly concluded (R., pp.58-59), Lewis’ second successive post-conviction petition was also untimely pursuant to I.C. § 19-4908 and Charboneau because Lewis did not file the petition within a “reasonable time” of his discovery of the factual basis for the claims. The factual basis of Lewis’ second successive post-conviction petition claims that his trial counsel and initial post-conviction counsel were ineffective would have been known to him at, or shortly after, his 2009 sentencing hearing and his 2010 initial post-conviction proceeding. Therefore, Lewis’ second successive post-conviction petition, filed in 2015, is clearly untimely. Other than alleging ineffective assistance of his initial post-conviction counsel, Lewis has failed to provide an explanation for this delay. Lewis has therefore failed to demonstrate that the district court erred in utilizing this basis to summarily dismiss his second successive post-conviction petition.

2. Lewis Failed To Set Forth A *Prima Facie* Case With Respect To Any Of His Second Successive Post-Conviction Petition Claims

In the alternative, Lewis has also failed to demonstrate that the district court erred in concluding that Lewis failed to set forth a *prima facie* case with respect to any of the claims in his second successive post-conviction petition.

In his first claim, Lewis asserted that his trial counsel was ineffective for failing to adequately argue a motion to suppress incriminating statements made by Lewis during police interviews. (R., pp.68-69.) Specifically, Lewis alleged that certain unspecified statements made during two of these interviews were the “product of duress,” because he had consumed a significant amount of marijuana, was detained for an extensive period of time, defecated in his pants during one of the interviews, and was not permitted to contact his mother. (Id.) Lewis further alleged that while trial counsel filed a motion to suppress, counsel failed to present the preceding facts to the district court. (Id.)

While Lewis thus alleged some facts in support of this claim, he failed to provide factual context sufficient to set forth a *prima facie* case. For example, Lewis did not allege what facts his trial counsel *did* present to the court, what specific statements or other evidence was the subject of the motion to suppress, or what grounds the district court relied upon in denying the motion to suppress. Further, no documents associated with the motion to suppress are a part of the appellate record in this case. On appeal, missing portions of the record are presumed to support the action of the trial court. Rutter v. McLaughlin, 101 Idaho 292, 293, 612 P.2d 135, 136 (1980). In the absence of this context, Lewis cannot demonstrate that the district court erred in concluding that Lewis failed to present

a *prima facie* case that he was entitled to relief on this claim.

In his second claim, Lewis asserted that his trial counsel was ineffective for failing to request a psychological evaluation prior to sentencing. (R., pp.69-70.) Specifically, Lewis alleged that his trial counsel failed to adequately investigate the nature of Lewis' "abusive relationship with his father," and the "heavy toll" that this relationship exacted on him. (R., p.70.) Lewis also alleged that his mother "identified [Lewis'] mental and physical problems and notified [t]rial [c]ounsel." (Id.) Once again, Lewis failed to provide adequate factual context for his claim. Lewis did not identify the specific nature of any alleged mental health issues that may have been in place at the time of the commission of the crime, or how such alleged issues would have compelled the district court to, pursuant to I.C. § 19-2522, order a psychological evaluation prior to sentencing. In the absence of such context, Lewis cannot demonstrate that the district court erred in concluding that Lewis failed to set forth a *prima facie* case that he was entitled to relief on this claim.

In Claims Three and Four, Lewis asserted that his initial post-conviction counsel was ineffective. (R., pp.70-72.) However, there is no constitutionally protected right to the effective assistance of counsel in post-conviction relief proceedings and such an allegation, in and of itself, is therefore not among the permissible grounds for post-conviction relief. See Murphy, 156 Idaho at 396, 327 P.3d at 372; Follinus v. State, 127 Idaho 897, 902, 908 P.2d 590, 595 (Ct. App. 1995).

Lewis has failed to demonstrate that the district court erred in summarily



dismissing his second successive post-conviction petition on any of the alternative grounds set forth by the district court in its notice of intent to dismiss and dismissal order. This Court should therefore affirm the district court's order summarily dismissing Lewis's second successive post-conviction petition.

#### CONCLUSION

The state respectfully requests that this Court affirm the district court's summary dismissal of Lewis' second successive petition for post-conviction relief.

DATED this 29th day of March, 2017.

/s/ Mark w. Olson  
MARK W. OLSON  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of March, 2017, served two true and correct copies of the foregoing BRIEF OF RESPONDENT by placing the copies in the United States mail, postage prepaid, addressed to:

DEREK WAYNE LEWIS  
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/s/ Mark W. Olson  
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MWO/dd